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OGC 77-3420
26 May 1977

OGC-77-3054

OGC Has Reviewed

MEMORANDUM FOR: Deputy Director for Administration

THROUGH: SSA/DDA

25X1A FROM: [redacted]
Office of General Counsel

SUBJECT: Payment of Travel Expenses Associated With Seeking an Abortion

1. You have requested our opinion as to whether there is any legal objection to using appropriated funds for payment of travel expenses related to abortions obtained by Agency employees or their dependents. Further, you specifically requested that we consider the impact of both our decision and the recent case of McRae v. Mathews[1] on the Agency's Association Benefit Plan.

2. Prior to our resolution of these specific issues, we must determine two related threshold questions. First, are there any situations where an abortion is covered under the Agency's Overseas Medical Program (hereinafter OMP) and secondly, exactly what type of abortions are we discussing? Concerning the first question it is clear that if the medical expenses for the abortion are payable under the OMP, travel to obtain such treatment would similarly be paid.

25X1A 3. [redacted] provides that benefits under the OMP are not available for normal pregnancies (one assumes "normal" relates to the ongoing condition of pregnancy and not to the personal plans or status of the individuals when that

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1/ The Supreme Court case alluded to in your memorandum is McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976), appeal docketed sub nom.; Califano v. McRae, No. 76-1113, 45 U.S.L.W. 3573. The appeal to the Supreme Court was filed on February 11, 1977, and is still pending. The questions presented include: (1) Did the district court exceed its jurisdiction in entertaining a complaint on its merits and in directing HEW to expend Federal funds for elective abortions? (2) Is there rational basis for congressional classification between medically-dictated abortions and elective abortions? The Supreme Court of the United States let stand the order of the Federal court in New York requiring HEW to continue funding abortions under Medicaid.

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condition was conceived, e.g. wanted or unwanted, wed or unwed). An exception to this rule is provided, however, in [redacted] for situations 25X1A where it states:

> Payment will not be made for obstetrical care except in cases where (a) complications arise because the treatment received was inferior to treatment available in CONUS or (b) where it is determined by the Director of Medical Services that the complications are clearly caused by the fact that the patient is or has been located abroad.

4. "Obstetrical care" obviously falls within the branch of medicine called obstetrics which is defined in J. Schmidt Attorneys' Dictionary of Medicine, Vol. 2, page 0-3 (1976):

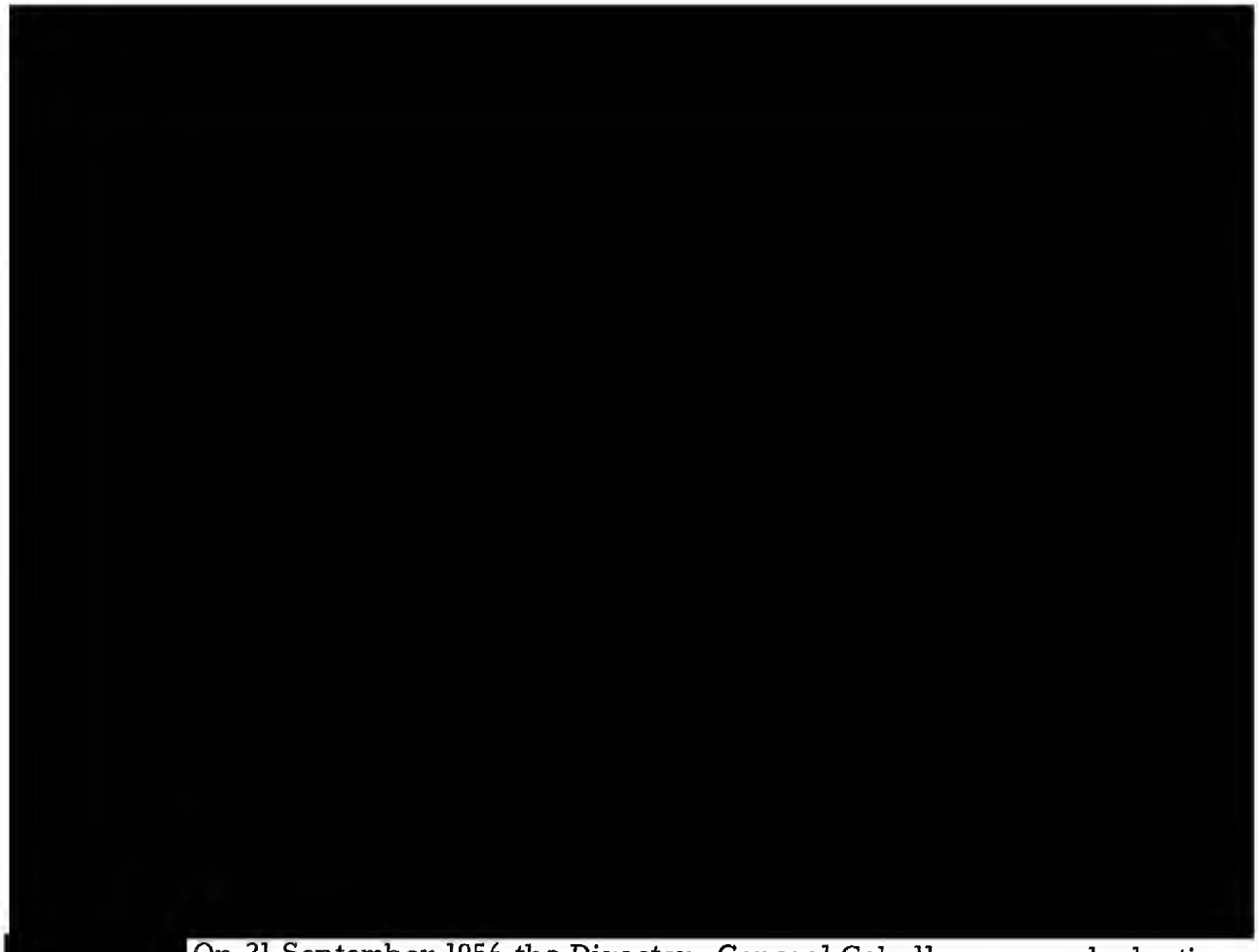
> The branch of medicine, technically of surgery, which deals with the care of women during their pregnancy, labor, and the post-labor period.

Certain types of abortions (i.e., those normally defined as therapeutic)[2] by most reasonable interpretations would fall within this definition. One might also conclude that all abortions fall within this definition. As noted in the previous paragraph, however, even if one assumes a liberal interpretation which concedes an abortion as a "complication" (or the treatment of a complication) payment cannot be made unless the need for the abortion was caused by (a) treatment inferior to that available in CONUS or (b) the fact the patient is located abroad.

5. A further limitation is the requirement that the "illness or injury" 25X1A cannot be caused by vicious habits, intemperance, willful misconduct, negligence, or the taking of an unwarranted risk by the employee or dependent [redacted] 25X1A [redacted] A determination under this criteria requires a factual judgment on the conduct of the employee or dependent and is, in the undersigned's opinion, outside the scope of this paper.

2/ Therapeutic abortions are defined as abortions induced as a therapeutic measure to save the life or protect the health of the mother or in recent years, for any number of other reasons such as serious malformation of the fetus, rape incest, etc.

6. We, therefore, conclude that few abortions (considering an abortion as a type of obstetrical care) are covered under the Agency's OMP. The only exceptions appear to be where complications arise because of inferior (by U.S. standards) obstetrical care available at the overseas location or where an abortion is a consequence of a treatment of an independent illness or injury. This conclusion also provides the answer to our second threshold question. Accordingly, our subsequent analysis will focus on those situations where the abortion would not be covered under the Agency's OMP. We now turn to a discussion of payment of travel expenses in cases where medical care is not authorized at Government expense. FOIAB5



FOIAB5 On 21 September 1956 the Director, General Cabell, approved adoption of the following provision of the Foreign Service Act, to wit, 22 U.S.C. §1157. This section states, in pertinent part:

> (a) In the event an officer or employee of the Service who is a citizen of the United States or one of his dependents requires medical care, for illness or injury not the result

of vicious habits, intemperance or misconduct, while stationed abroad in a locality where there is no qualified person or facility to provide such care, the Secretary may, in accordance with such regulations as he may prescribe, pay the travel expenses of such person by whatever means he shall deem appropriate, including the furnishing of transportation, and without regard to the Standardized Government Travel Regulations and section 73b of Title 5, to the nearest locality where suitable medical care can be obtained.... (Emphasis added.)

25X1A

9. The Agency's overseas medical program, established pursuant to the cited authorities, [redacted] states:

> The Agency's Medical Program for Employees and Dependents Abroad applies only to an illness or injury which requires hospitalization or equivalent medical treatment under standards generally observed for admission as an inpatient to a hospital in the United States, except that travel may be authorized in qualifying circumstances to obtain medical care not covered by this program. Eligibility for this program requires that the injury or illness cannot be caused by vicious habits, intemperance, willful misconduct, negligence, or the taking of an unwarranted risk by the employee or dependent. (Emphasis added.)

25X1A

Subparagraph [redacted] sets forth the eligibility requirements for medical travel in somewhat greater detail and states:

> When an employee or dependent who is eligible for benefits under the Agency's Medical Program for Employees and Dependents Abroad is located in an area where there is no qualified person or facility to provide appropriate medical care, he is eligible for travel at Government expense to the nearest locality where suitable medical care can be obtained. Such travel may be authorized even if the medical care is not at Government expense. This may include travel for obstetrical care, emergency dental care, and outpatient treatment not related to inpatient hospitalization. (Emphasis added.)

The emphasized language in both references would appear to permit (but not require) payment for travel associated with abortions if it is a "qualifying circumstance." "Qualifying circumstance" is not specifically defined in either [redacted] 25X1A One would assume that such a determination would encompass as a minimum the requirement that (a) the travel be for an illness or injury not caused by vicious habits, etc.; and (b) it occurs overseas in a location where suitable medical care is unavailable. It is clear, however, that 25X1A "qualifying circumstances" do not literally encompass the exclusions noted in [redacted] 25X1A in view of the fact that paragraph [redacted] specifically notes that travel for obstetrical care may be authorized. (Note our discussion in paragraph 4 concerning whether obstetrical care includes abortions.)

10. 3 FAM 686.1(a) of the Uniform State/AID/USIA Regulations also provides for medical travel for an illness or injury whether or not the medical care is at Government expense.

> Any American Foreign Service employee or any of his dependents as defined in section 681.6a who require medical care for illness or injury not the result of vicious habits, intemperance, or misconduct, while located or stationed abroad in a locality where there is no qualified person or facility to provide such care, and except as provided in section 684.7-4, shall be eligible to travel at Government expense to the nearest facility where suitable medical care can be obtained, whether or not the medical care is at Government expense. (Emphasis added.)

The emphasized language indicates that the employee shall be eligible for such travel if the other conditions are met. Mr. William Cook, Chief, Claims Section, Office of Medical Services, Department of State, has advised the undersigned that the Department of State has no difficulty in concluding that an elective abortion is an "illness or injury" and, accordingly, pays for travel in such circumstances.

25X1A [redacted] provides:

> EXCLUSIONS. Benefits under these programs are not available for the following:
>
> (a) Normal pregnancy
> (b) Elective correction of conditions that existed prior to assignment abroad, and all other elective procedures except with prior headquarters approval
> (c) Ordinary dental care

25X1A

11. As noted earlier [redacted] provides that certain travel, even where the medical care is not payable, may be authorized. Earlier language indicates that the employee is eligible for travel. There is no explanation as to why the Agency adopted the language "may" and "is" as opposed to the language "shall" contained in the State regulation and section 4 of the CIA Act of 1949 as it relates to Agency employees. It would appear, however, that our regulation does permit the Agency some discretion in deciding whether a certain type of "illness or injury" will qualify for travel expenses, particularly when involving dependents. Though Agency practice in the past has been to pay such claims, the undersigned has been unable to find any specific declaration of Agency policy either expressly permitting or expressly limiting the payment of travel expenses for abortions.

12. We now turn to the basic question of the propriety and legality of using appropriated funds to facilitate the procurement of an elective, nontherapeutic abortion by payment of travel expenses. In this regard it would be pertinent, in the undersigned's opinion, to examine other occasions where Congress has faced the question of the use of appropriated funds in circumstances involving abortions. Our research has uncovered several occasions where this question has been addressed by specific legislation. It should be noted, however, that this legislation to be examined dealt with issues different than those raised in our problem and therefore, cannot be determinative of our case, but only indicative of a congressional attitude at a particular point in time on a particular subject.

13. The first is section 2(3) of Public Law 93-189 (Foreign Relations and International Development), prohibiting the use of the funds appropriated to those agencies for elective abortions. Section 2(3) of Public Law 93-189 is codified at 22 U.S.C. 2151(1) and states:

> None of the funds made available to carry out this subchapter shall be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.

While this section is not directly applicable to our case, it is evidence of existing congressional concern about the use of appropriated funds for abortions.

14. Domestic congressional concern on this subject is clearly manifested by the legislative history and passage of section 209 of the Labor-HEW Appropriation Bill of 1976 which states:

> None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

This section is a watered-down version of the "Hyde Amendment" which originally passed the House by a vote of 207-167, worded as follows:

> None of the funds appropriated under this act shall be used to pay for abortions or to promote or encourage abortions.

The Senate rejected this language and repeatedly attempted to persuade the House to agree to language which the House believed would leave the door open to payment for abortions in cases where it is not a true medical necessity. The House rejected such proposals, and the Senate finally agreed to the wording currently enacted. As noted previously, the legality of this prohibition is presently being tested before the Supreme Court of the United States. Similar prohibitions concerning the use of appropriated funds are included in the Family Planning Services and Population Research Act of 1973 [4] and the legal Services Corporations Act. [5]

15. It is apparent, however, notwithstanding the dispute over the "Hyde Amendment," that appropriated funds are presently being indirectly used to pay for medical expenses incurred for elective abortions, since Medicaid and many health plans sponsored under the Federal Employees' Health Benefits Act provide for the payment of such claims and Federal agencies pay a portion of the required premiums. These are not, however, direct subsidies and are arguably required by virtue of the coverage of approved health plans, many of which are incorporated into union agreements.

16. Mr. George MacWhorter, Acting Chief, Office of Employee Organizational Plans, Bureau of Retirement, Insurance and Occupational Health, Civil Service Commission, stated that the inclusion of payments for medical expenses relating to elective abortions in Agency health plans is primarily a

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4/ 42 U.S.C. §§ 300a to 300a-6 (1970), as amended; 42 U.S.C. §§ 300a to 300a-7 (Supp. IV, 1974).

5/ 42 U.S.C. §§ 2996-2996i (Supp. IV, 1974).

matter of policy and negotiation. He was not aware of any legal authority either expressly permitting or expressly prohibiting payment of such claims. He noted unofficially that the Bureau has questions concerning the propriety of the payment of elective abortion claims, but as of now the issue has not surfaced in a manner which requires the establishment of a Civil Service Commission policy.

17. Mr. MacWhorter also discussed the Association Benefit Plan (ABP) which he supervises in his Civil Service Commission capacity. He noted that the ABP neither specifically permits nor prohibits the payment of medical expenses related to elective abortions. Absent specific language, the payment of such claims would then depend upon either the scope of obstetrical care provided or the interpretation of what is an "illness or injury" covered under the Plan. Mr. MacWhorter's initial reaction, contrary to the current Agency practice, was that elective abortions would not be covered under the Association Benefit Plan. On this point I am inclined to disagree with Mr. MacWhorter, and support such payments by the Plan, since the medical profession and a number of judicial decisions have concluded that pregnancy qualifies as a condition which requires medical treatment and that an abortion is one of the eligible treatments available.

18. It should be noted that the previous discussions (paragraphs 13, 14 and 15) focus on payment of medical expenses, not travel expenses, and are, therefore, only applicable to the extent that they demonstrate Government policy. Further guidance on Government policy can be found by examining these statutes and rulings concerning the expenditure of Federal funds and the Agency's enabling legislation and regulations.

19. 31 U.S.C. 628 provides that:

> Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

The Comptroller General of the United States has further interpreted this language to mean that appropriations may be used to procure only that which is needed as distinguished from that which is desired. 16 Comp. Gen. 171 (1936). Further, the administrative discretion concerning the uses of appropriations may not go beyond the statutes, nor may it be exercised in conflict with law or for the accomplishment of purposes unauthorized by regulation. 18 Comp. Gen. 285 (1938).

20. Certainly Congress intended that Agency appropriated funds be used for the payment of overseas medical travel expenses incurred by Agency employees (section 4(b) of the CIA Act of 1949, as amended) or their dependents by virtue of our adoption of the State Department's authority. Regretably, however, the legislative history of these two acts provides little enlightenment as to whether Congress considered it appropriate or unappropriate to pay travel expenses for elective abortions. We noted earlier in paragraph 4, that such travel would seem to be authorized if an elective abortion qualifies as treatment of an illness or injury which is not the result of vicious habits, intemperance or misconduct.

21. Again, there is little legislative history to enlighten us as to what Congress considers to be an "illness or injury." Similarly, neither Agency nor State Department regulations define "illness or injury." In a recent judicial examination of this issue the court assumes abortion is a treatment of pregnancy even though pregnancy is not an illness and medical assistance does not cure it. Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.N.Y. 1972), aff'd in part sub nom.; Ryan v. Klein, 412 U.S. 924 (1973), vacated and remanded in part, 412 U.S. 925 (1973). The court recognized pregnancy as a physical condition requiring medical attention and that elective abortions were an acceptable alternative. It, therefore, held that the choice between childbirth and abortion is a medical decision for which Medicaid payments were authorized (i.e., it is obstetrical care).

22. Other jurisdictions, however, have held that Medicaid did not require a state to fund elective abortions.[6] These courts have noted that abortion was illegal in most jurisdictions at the time Medicaid was enacted and concluded that Congress had not intended to require the funding of elective abortions. They also found congressional disfavor towards abortion in other legislation citing the Family Planning Services and Population Research Act of 1973 (which specifically excluded abortion as a means of family planning recognized under the Act) and the Legal Services Corporations Act (which provides no funds be used for legal assistance for those seeking to procure nontherapeutic abortions). In their view, this congressional disfavor toward abortion required a determination that Medicaid did not include the funding of elective abortions as a necessary medical service.

6/ See Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975).

23. The constitutional issue grounded on equal protection arguments has not yet been resolved by the U.S. Supreme Court. This argument is based upon the fact that Medicaid (appropriated) funds are used to pay for therapeutic abortions. Similarly, it should be equally available for elective abortions. As noted earlier (footnote 1), this question is presently before the U.S. Supreme Court. Notwithstanding the outcome of this case, the undersigned believes it is safe to say that Congress disfavors (and in some cases prohibits) the use of appropriated funds for elective abortions.

24. In summary, the undersigned has concluded that the question of whether the Agency's overseas medical program should permit or prohibit payment of expenses for elective abortions is, at this time, basically an unresolved policy question. This opinion is based upon (a) the absence of specific legislation resolving this issue; (b) the present controversy in the U.S. Supreme Court; and (c) the wording of pertinent Agency statutes and regulations. In the development and implementation of a policy in this regard, existing congressional concerns should be considered (as well as the outcome of the Supreme Court case discussed). With respect to the interpretation of existing language in [redacted] 25X1A and [redacted] it is our opinion that medical travel for therapeutic or elective abortions may be authorized if recommended by the Director of Medical Services and concurred in by the Director of Personnel and C/CCS as provided by [redacted] Conversely, we see no legal objection to promulgating regulations excluding travel expenses in the case of elective abortions since the state of the law would permit, as a reasonable interpretation, the conclusion that a non-therapeutic abortion is elective surgery and/or does not fall within the definition of an illness or injury contemplated by the law.

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DD/A Registry
File Medical

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3	5E 58 Hqs		
4			
5			
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	ACTION		DIRECT REPLY		PREPARE REPLY
	APPROVAL		DISPATCH		RECOMMENDATION
	COMMENT		FILE		RETURN
	CONCURRENCE		INFORMATION		SIGNATURE

Att: DDA 77-3054

Remarks:

In retrospect, I could have flipped a coin! Will you (& yours) get together with Brad, talk this out, & then let all of us get together to chat. Thanx. /s/Jack

FOLD HERE TO RETURN TO SENDER

FROM: NAME, ADDRESS AND PHONE NO.	DATE
Deputy Dir [redacted] tion	31 MAY 1977
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FORM NO. 1-67 237 ★USGPO: 1976 — 202-953 (40)

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DDA:JFBlake:kmg (31 May 77)
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DDA 77-3054: Memo dtd 26 May 77 to DDA via SSA/DDA fr [redacted] of OGC, subj: Payment of Travel Expenses Associated With Seeking an Abortion

"In retrospect, I could have flipped a coin! Will you (& yours) get together with Brad, talk this out, & then let all of us get together to chat. Thanx. /s/Jack

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

Payment of Travel Expenses Associated With Seeking an Abortion

FROM: [redacted] 25X1A
Assistant General Counsel

EXTENSION [redacted]

NO.

DATE 26 May 1977 25X1A

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. SSA/DDA				
2.				
3. DDA	31 MAY 1977		[redacted]	25X1A
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Jack--

Finally, an answer on your abortion travel question. As you might guess it has been much massaged and remassaged. The basic legal position at this time is that we could probably defend with equal force either a positive or negative policy decision on such travel at Government expense

[redacted]

25X1A

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